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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)**

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID JOHN SPRONG,

Defendant and Appellant.

C059837

(Super. Ct. Nos.
05F04145, 07F09092)

Defendant David John Sprong was charged in a consolidated information with committing six counts of lewd and lascivious conduct with a child under the age of 14 years against two victims, Tracy R. and Christina B. (Pen. Code, § 288, subd. (a).)¹ A jury convicted defendant of five counts and the trial court found true allegations of substantial sexual conduct (§ 1203.066, subd. (a)(8)) and a prior conviction (§§ 667, subds. (b)-(i), 667.51).

¹ Undesignated statutory references are to the Penal Code.

Sentenced to 26 years four months in state prison, defendant appeals. His sole contention is that the trial court prejudicially erred in granting the prosecution's motion to consolidate the information charging him with the Tracy R. count and the information charging him with the Christina B. counts. We disagree and shall affirm the judgment.

FACTUAL BACKGROUND

Christina B.

In the summer of 1990, Christina B.'s mother began dating defendant when Christina was five years old. When her mother was not in the home, defendant would lie nude, masturbating, and fondling Christina's chest and vagina in her mother's bed. Christina stated that this happened several times. Christina had to orally copulate defendant on three occasions in the living room. Defendant turned on pornography on the television in her mother's bedroom during the molests. One time, defendant entered Christina's bedroom, pulled her covers down, and fondled her vagina. Once in the shower, Christina had to fondle his penis.² In a playhouse in the backyard, defendant molested Christina.

In every incident of molestation, defendant told Christina that she would get in trouble or be hurt if she reported it, so Christina did not tell her mother for several years. She was

² The jury deadlocked on count six charging lewd conduct in the shower.

afraid of defendant who she had seen argue and fight with her mother. Even when her sister (Stephanie B.) revealed that defendant had molested her, Christina did not tell and, in 1991, denied that he had molested her. In December 2005, Christina told a district attorney's investigator about the molestations, including that defendant had tried to digitally penetrate her but his finger was too big. Christina was convicted in 2007 of petty theft and in 2005 of forgery.

Stephanie B. testified that she saw defendant naked and masturbating in her mother's bed with Christina next to him on more than one occasion. Stephanie also saw defendant French kiss Christina. Defendant taught Stephanie how to masturbate when she was 11 years of age. When Christina saw 11-year-old Stephanie masturbating in the playhouse, Christina commented, "That's what [defendant] does to me."

Christina's mother testified that she had left defendant alone with Stephanie and Christina on one occasion and returned to find him in her bedroom with her daughters and a pornographic video was playing. Before Christina turned 18 years of age, she revealed to her mother that defendant had molested her but did not want to report it to the police because of defendant's threats.³

³ Christina testified she reported the molestations to her mother when she was about 10 years old and again when she was 16.

Tracy R.

Tracy R.'s mother began dating defendant in 1994 when Tracy was 12 years old. Tracy and her mother went to defendant's apartment and then the three of them went to the sauna. The sauna was pitch black inside. With the permission of her mother, defendant gave Tracy a massage during which he moved her underwear aside and digitally penetrated her vagina. Tracy did not say anything or try to get away. She was too afraid and was shaking. He readjusted her underwear before they left the sauna. A few days later, Tracy's mom took her back to defendant's apartment, and when her mom went to the restroom, defendant asked Tracy, "Didn't that feel insanely good?" Tracy denied that it had and did not understand that what he had done was unlawful.

Tracy did not want to be around defendant ever again and told her mother. Nevertheless, to be with her mother at holidays, Tracy had to be around defendant. For Christmas 1994, defendant gave Tracy a pair of black lace tights and a crotchless negligee from Frederick's of Hollywood.

Another incident occurred when Tracy was a freshman in high school. While working out on exercise equipment in a home gym, defendant entered the room, commented on her "ass," and grabbed her inner thigh. Tracy moved away from him. Tracy immediately reported the incident to her mother, who did not take her seriously.

During the summer after her freshman year, Tracy participated in a beauty pageant in Nevada. Her mother brought defendant with them and stayed in the same motel room. While her mother slept in one bed next to defendant, he masturbated. Tracy, in the other bed, had to turn away. Tracy told her mother the next day. Her mother again said she did not believe her.

When Tracy was in college, she learned something from her younger sister which made Tracy disclose to her mother that defendant had molested Tracy when she was 12 years of age. Tracy provided no details to her mother.

On March 2, 2005, a year after graduating from college, Tracy reported the molestation to the police. Her mother had encouraged Tracy to report it and apologized for not believing her sooner. Her mother believed that defendant was molesting Tracy's younger sister. Later, her mother asked Tracy repeatedly to recant. Tracy reported this to a detective but did not recant. Tracy then received anonymous phone calls, including those she recognized from phones belonging to her mother and defendant. Someone vandalized Tracy's car and Tracy falsely told her brother that photos had been taken of the perpetrator. The calls then stopped.

Tracy's brother confirmed that Tracy had reported the molestation to him and his spouse in the summer of 2004 and that their mother refused to believe Tracy.

In March 2006, defendant failed to appear in court and fled with Tracy's mother and their daughter. In February 2007, they were found in Louisiana after having been featured on *America's Most Wanted*.

Uncharged acts

The prosecution presented propensity evidence (Evid. Code, § 1108) and evidence of defendant's common scheme or plan (*id.*, § 1101, subd. (b)). Tonya J. testified that in 1989, when she was 13 years old, she visited her sister who lived in an apartment complex where Tonya used the pool with her friends. She met defendant at the pool. Defendant took Tonya and her friends "four-bying" in his truck. While Tonya's friend drove, Tonya had to sit on defendant's lap. He pushed her towards his pelvic area three times and told her not to tell. Later that night, he gave her a key to his apartment, asking her to wake him up the next morning. When she used the key the next day, defendant did not want to leave the apartment and asked her to watch a movie with him in bed. She got in his bed fully clothed. He rubbed between her legs, then her vaginal area very hard, and kissed her. She left his apartment. Based on this conduct, defendant was convicted of misdemeanor sexual battery (§ 243.4, subd. (d)) on February 20, 1990.

Stephanie B., Christina B.'s sister, testified that defendant molested her in 1990 when she was 11 years old. He wanted her to get into bed with him and Christina. He was naked from the waist down. Stephanie sat on the bed and he pulled her

over on top of him, and fondled her breasts and vaginal area. The second time, she got into bed with him and he had her rub his penis until he ejaculated. The third time she got into bed with him, he put her on top of him and rubbed her on his penis until he ejaculated. He always told her not to tell. Defendant also ran around the house naked in front of the children and exposed himself one time in the pool. Based on his no contest plea, defendant was convicted of a violation of section 288, subdivision (a), on April 3, 1992.

The parties stipulated that defendant was also convicted (by a no contest plea) of statutory rape (§ 261.5) involving another victim (Serena) on April 3, 1992.

Defense

Defendant testified and denied all charged and uncharged allegations of sexual misconduct other than his sexual relationship with 17-year-old Serena for which he was convicted of statutory rape. He denied committing the acts underlying his prior convictions involving Tonya and Stephanie. He explained that he entered a negotiated plea of no contest for a misdemeanor charge involving Tonya and received probation. He claimed that Tonya's sister had been angry with him for repossessing a car. He explained that he entered a negotiated plea involving Stephanie and Serena in exchange for the prosecution's agreement not to file charges involving Christina (contrary to a deputy district attorney's testimony that the prosecution made no such agreement). Defendant claimed that he

did not get along with Stephanie. When she acted out, he would get her in trouble with her mother. He claimed she also lied in her diary (notations she had made when she was 11 years old about defendant being naked).

Defendant claimed that Tracy's mother had threatened to turn him in many times for molestation of their daughter Justine in order to take advantage of him financially. Defendant asserted that Tracy made up the allegations because her mother had encouraged her to do so to benefit her mother in divorce and child custody proceedings.

Donna S., Tracy's mother's sister, confirmed that Tracy's mother threatened defendant repeatedly that she would use defendant's past sex offenses against him if he ever ended their relationship. Defendant's friend, Scott Kendall, overheard Tracy's mother threaten to use defendant's past to prevent him from obtaining custody of their daughter and later, Tracy's mother explained she had done so because defendant had removed her from a hair salon they had run.

Defendant explained that when he lived with Christina and Stephanie's mother, he slept in their mother's room. He denied watching pornography with Christina and Stephanie. He claimed that the girls had turned the pornographic video on and he caught them just as their mother arrived home.

PROCEDURAL HISTORY

In case No. 05F04145, a January 2006 amended information charged defendant with one count of lewd and lascivious conduct

with a child under the age of 14 years (Tracy R.). It was further alleged that defendant had a prior conviction (§ 288, subd. (a)) within the meaning of sections 667, subdivisions (a) and (b) through (i), and 1170.12.

In case No. 07F09092, a November 2007 information charged defendant with five counts of lewd and lascivious conduct with a child under the age of 14 years (Christina B.). It was further alleged that defendant had a prior conviction within the meaning of section 667, subdivision (a).

A December 2007 consolidated information (with case No. 05F04145 designated as the lead case) charged defendant with six counts of section 288, subdivision (a): count one, against Tracy R., between November 1, 1994, and January 31, 1995; counts two through six, against Christina B., between June 1, 1990, and September 1, 1992. All were alleged to be serious felonies. (§ 1192.7, subd. (c).) The consolidated information alleged one strike prior (§§ 667, subds. (b)-(i), 1170.12), substantial sexual conduct (§ 1203.066, subd. (a)(8)), and five-year enhancements (§§ 667, subd. (a), 667.51, subd. (a)).

The jury convicted defendant of committing five counts: count one against Tracy R., and counts two through five against Christina B. The jury found the substantial sexual conduct allegations to be true. The jury deadlocked on count six (Christina B.) and a mistrial was declared as to that count. In bifurcated proceedings, the court found a prior conviction

allegation to be true within the meaning of section 667, subdivisions (b) through (i), and section 667.51.

As noted earlier, defendant was sentenced to an aggregate term of 26 years four months in state prison.

DISCUSSION

I.

Defendant contends that the trial court prejudicially erred in granting the prosecution's motion to consolidate the information charging him with the Tracy R. count and the information charging him with the Christina B. counts. We disagree.

A. Background

The prosecutor moved to consolidate the information charging defendant with one count of lewd conduct against Tracy and the information charging him with five counts of lewd conduct against Christina B. The prosecutor argued the offenses were of the same class, all being lewd conduct against a minor under the age of 14 years (§ 288, subd. (a)), committed by the same defendant, during a similar time frame and place, involving the identical type of relationship to defendant; that is, the children of a girlfriend, and a similar modus operandi. The prosecutor asserted that the evidence in both cases would be "repetitive as to the motive and modus operandi," as was the propensity evidence, and the law enforcement witnesses were the same. The prosecutor denied that consolidation was sought because one case was weak, arguing that the victims were both

cooperative and had just recently disclosed the offenses to law enforcement.

Although conceding that the offenses were of the same class, defense counsel argued that the effect "would be overly prejudicial," focusing primarily upon the "great disparity in the weight of the evidence" and the "starkly different factual backgrounds, the motivations and credibility underlying the very recent accusations [which] are subject to different tactics." Defense counsel was not prepared to address the issue of other-crimes evidence that might be admissible at trial. Defense counsel conceded that the defense to all offenses was that defendant did not commit the conduct alleged.

In granting consolidation, the court determined that the offenses were of the same class of crimes and "appear[ed] to be potentially . . . cross-admissible pursuant to [Evidence Code section] 1108" and admissible to establish intent and modus operandi under Evidence Code section 1101, subdivision (b). The court noted that defense counsel's argument with respect to the potential danger of consolidation was true in any case against a defendant involving separate victims of the same type of charges. The court found that the informations were properly joinable "in the interest of judicial efficiency and economy."

B. Analysis

"Two or more offenses 'of the same class,' or 'connected in their commission,' may be charged and tried together, but the trial court may sever counts in the interest of justice.

(§ 954.) When exercising its discretion, the court must balance the potential prejudice of joinder against the state's strong interest in the efficiency of a joint trial." (*People v. Arias* (1996) 13 Cal.4th 92, 126 (*Arias*).)

"Joinder is generally proper when the offenses would be cross-admissible in separate trials, since an inference of prejudice is thus dispelled." (*Arias, supra*, 13 Cal.4th at p. 126.)

To demonstrate that the trial court committed reversible error in granting the prosecutor's motion to consolidate, defendant must ""clearly establish that there [was] a substantial danger of prejudice requiring that the charges be separately tried."" [Citations.] We examine a pretrial [consolidation] ruling on the record then before the court. [Citation.] Even if the ruling was correct when made, we must reverse if defendant shows that joinder actually resulted in 'gross unfairness,' amounting to a denial of due process." (*Arias, supra*, 13 Cal.4th at p. 127; see also *People v. Soper* (2009) 45 Cal.4th 759, 769 [consolidation]; *People v. Lucky* (1988) 45 Cal.3d 259, 275-278 [consolidation].)

The evidence was cross-admissible and joinder was proper. Pursuant to Evidence Code section 1108, evidence that defendant molested Tracy would have been admissible in a trial on charges that defendant molested Christina, and vice versa, to demonstrate defendant's disposition or propensity to commit the charged offenses. (*People v. Falsetta* (1999) 21 Cal.4th 903,

911 (*Falsetta*).) In ruling on the prosecutor's motion to consolidate, the trial court cited the cross-admissibility of the evidence. The trial court did not abuse its discretion in so ruling. (*People v. Osband* (1996) 13 Cal.4th 622, 666.) We must still determine whether defendant has demonstrated that "joinder actually resulted in 'gross unfairness,' amounting to a denial of due process." (*Arias, supra*, 13 Cal.4th at p. 127.) Defendant has failed to meet this high burden.

Although recognizing that a determination of prejudice is case specific, defendant misplaces his reliance upon cases in which joinder was deemed prejudicial. For example, defendant cites *Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073 in which murder charges involving two victims were joined. The evidence was much stronger on one murder and was not cross-admissible but the jury had been led to believe otherwise by the prosecutor's closing argument and jury instructions, tainting the jury's verdict. (*Id.* at pp. 1075-1076, 1083-1085.)

Defendant claims consolidation here combined a weak case with a stronger case, resulting in "a higher chance of conviction on the Tracy R. count than if the two had been separately tried." Defendant argues the Christina B. allegations were stronger primarily because he had been convicted of molesting her sister, Stephanie. He argues the evidence on the Tracy R. count was weaker because he had no prior conviction of molesting one of her family members. Relying upon preliminary hearing testimony, defendant argues

Tracy's mother encouraged Tracy to lie, and Tracy's younger sister corroborated Tracy's mother about having been coached to lie. Defendant also argues that Tracy was unable to produce the negligee she claimed defendant had given her at Christmas. Defendant further argues that the factual contexts were different in that there was no evidence that Christina made her allegations to secure an advantage in custody and separation proceedings for one parent over the other.

We reject defendant's claims. All of the charges required an assessment of the victims' credibility. The Tracy R. case was strengthened by the propensity evidence, which included not only the evidence with respect to Christina B. but also the evidence with respect to Stephanie, Tonya and Serena.

Defendant argues that "[p]art of the trial court's rationale for joinder was the state's need to provide corroborative evidence under Penal Code section 803, subdivision (f)(2)."⁴ Defendant misreads the record. In arguing in favor of consolidation, the prosecutor stated:

"One defendant committed like sex offenses during a similar time frame. We're talking all acts occurring between 1991 and 1994 when you look at the two different complaints and informations, so at the time the victims are of matching age, classification, they are under 14, and the victims had an

⁴ Section 803, subdivision (f) provides the circumstances in which the statute of limitations is tolled or extended for certain sex crimes, including section 288.

identical type of relationship with the defendant in that the defendant was dating their mothers, so it's the victims who came forward as adults which is also a common ground when they finally reported these cases.

"I think a separate trial is a privilege and not a matter of right, and I think this case speaks loudly for the fact that it should be consolidated. Not only is the class of crimes similar as I stated, but also the evidence in this case is the same.

"It's the same [Penal Code section] 803 evidence. It's the same [Evidence Code section] 1108 evidence, same [Evidence Code section] 1101, subdivision (b) evidence. The witnesses are the same. The officers are the same. The defendant's prior[] that would be used against him [is] the same. The *Castro*^[5] material is the same, and I haven't heard anything that would show that by consolidating the case the defendant would be in danger of prejudice, so I would ask the Court to consolidate both the informations [in case Nos.] 05F04145 and F709092, and I have provided today a consolidated information [case No. 05F04145]."

Section 803 was not mentioned by the trial court in granting the consolidation motion:

"I will grant the consolidation. It would appear to me that the offenses are properly joinable. They are offenses of

⁵ *People v. Castro* (1985) 38 Cal.3d 301, 314.

the same class of crimes. Generically they involve similar conduct involving similar types of relationships.

"The danger cited by [defense counsel] is inherent really in any joined case where a defendant, singular defendant, is pending separate charges involving separate victims, so it would appear that in the interest of judicial efficiency and economy that this is a case that is properly joinable, and we will join both matters under case [No.] 05F04145."

Defendant is mistaken about the trial court's rationale and, based at least in part on this mistake, defendant asserts that the evidence was not cross-admissible to prove modus operandi under Evidence Code section 1101, subdivision (b). He argues that in the summer of 1990, when he began to date Christina and Stephanie's mother, he was on misdemeanor probation for his February 1990 conviction of sexual battery against Tonya and was violating the same when he started living with Stephanie and Christina and their mother. He claims the facts involving Tracy R. are "radi[c]ally different" in that Tracy did not live in the home with her mother and defendant because he was on felony probation for his conviction for molesting Stephanie; thus, defendant "demonstrated a radical change from his 1990 behavior" and "did not display a common modus in both fact patterns." Defendant further claims that the evidence was not cross-admissible to prove intent. Defendant relies on the court's statement during its discussion with defense counsel that the evidence would be admissible as

propensity and possibly some other issue such as intent. The prosecutor noted that the evidence would be offered on *modus operandi* and intent. Defendant argues that all the touchings involved the victims' private areas which "unambiguously demonstrat[ed] intent to obtain sexual gratification."

The foregoing arguments essentially ignore that the evidence was cross-admissible under Evidence Code section 1108 to show defendant's disposition or propensity to commit the offense. We need not discuss whether the evidence was also admissible under Evidence Code section 1101, subdivision (b). (*People v. Poplar* (1999) 70 Cal.App.4th 1129, 1138.)

Defendant asserts that, even if admissible as propensity evidence, the evidence was unduly prejudicial. He argues that the Christina B. evidence was highly inflammatory in the Tracy R. case because Christina was five years old at the time of the offenses. He also argues that the Christina B. evidence in the Tracy R. case was misleading because the facts showed significant differences in *modus operandi*, leaving a "misimpression about [defendant's] behavior after he left prison."

While the charge that he molested five-year-old Christina was inflammatory, so are the charges that he molested Stephanie and Tracy, daughters of the women he was dating at the time. The jury would be under no misimpression about defendant's behavior.

Defendant argues joinder was highly prejudicial because the prosecution already had three separate incidents involving Tonya, Stephanie, and Serena, and did not need the Christina B. evidence in the Tracy R. case and vice versa. Defendant also argues that joinder was prejudicial and denied him a fair trial on all counts based on the lack of credibility of Tracy R. and Christina B. Without the Christina B. counts, he argues it was "far more likely that the jury would have seen the claims Tracy made as incredible" and joinder influenced the Christina B. counts since the evidence was not overwhelming. Defendant notes that Christina repeatedly denied that anything happened to her when Stephanie reported being molested by defendant in 1991; Christina was very young in comparison to defendant's other victims; and Christina's claim that she reported the molests when she was in middle school and high school was not supported by any of the mandatory reporters.

Neither victim immediately reported the molests. The credibility of both victims was challenged. Each count depended on an evaluation of the victim's credibility and each count was supported by propensity evidence, which included not only defendant's offenses against Tonya, Stephanie, and Serena, but the evidence that he committed offenses against Christina and Tracy which was cross-admissible. Defendant's offenses involving Tonya, Stephanie and Serena demonstrated defendant's common plan or scheme to prey on minor girls and bolstered the credibility of both Christina and Tracy. Inherent in any case

in which propensity evidence is admitted is the inflammatory nature of the evidence. The admission of propensity evidence under Evidence Code section 1108 does not violate due process. (*Falsetta, supra*, 21 Cal.4th at pp. 912-922.) We reject defendant's claim of prejudice because a strong case was joined with a weak case, or two weak cases were joined. Joinder did not result in gross unfairness or a denial of due process.

II.

Pursuant to this court's miscellaneous order No. 2010-002, we deem defendant to have raised the issue whether recent amendments to section 4019, effective January 25, 2010, entitle him to additional presentence custody credits. (Stats. 2009, 3d Ex. Sess., ch. 28, § 50.) They do not. (§§ 1192.7, subd. (c)(6), 4019, subd. (b)(2).)

DISPOSITION

The judgment is affirmed.

_____, BUTZ, J.

We concur:

_____, RAYE, Acting P. J.

_____, CANTIL-SAKAUYE, J.